SUPREME COURT, U. S.

FILED

IN THE

Supreme Court of the United States

October Term, 1975

No. 940

SUSAN E. O. BREAKEFIELD,
Petitioner,

v.

THE DISTRICT OF COLUMBIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NICHOLAS A ADDAMS
1707 N Street, N.W.
Washington, D.C. 20036

JOHN I. COLDREN, III
Suite 600
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorneys for Petitioner.

THE CASILLAS PRESS, INC. - 1919 K Street, N. W. - Washington, D. C. 20006

INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED FOR REVIEW	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT –	
1. The Court of Appeals (as did the lower court) strongly urged this Court to review its past rulings in *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317 (1820) and *Heald v. District of Columbia*, 259 U.S. 114 (1922) in view of the contentions presented by Petitioner both as to the original soundness of such rulings and as to their continuing vitality in the light of later and more recent Supreme Court pronouncements. Being a lower Court, the Court of Appeals, however, did not feel competent to find error in or erosion of said rulings.	5
2. Fundamental rights of over 850,000 residents of the District of Columbia are involved	6
3. Petitioner, and other citizens of the District of Columbia are being taxed without representation in violation of "that great principle which was asserted in our revolution, that representation is inseparable from taxation". *Loughborough v. Blake*, 18 U.S. (5 Wheat) at 324	6

Page

4. *Heald* v. *District of Columbia*, supra, the only case sustaining a local income tax, is inconsistent with the rationale of *Knightbrought* which recognizes the principle of "no taxation without representation". *Knightbrought*, however, holds that the principle is not violated with respect to a *uniformly imposed national* tax since the citizens of the District of Columbia are *virtually represented* by the citizens of the several states who similarly bear the burden of the taxes. Citizens of the District are *not virtually represented* by the citizens of the several states with respect to a *local income* tax since the citizens of the several states do not bear the burden of the taxes. 6

5. *Heald* v. *District of Columbia*, supra, is inconsistent with the criterion of constitutionality developed since its rendition and with this Court's standards under the Due Process Clause of the Fifth Amendment and under the Ninth Amendment since (1) the Constitution contains provisions recognizing that an individual cannot be taxed without actual or *virtual* representation; and (2) the right not to be taxed without actual or *virtual* representation is a right fundamental to liberty and justice. 8

6. No express provision of the Constitution grants Congress the power to tax without representation. It is unreasonable to imply that the power to legislate exclusively for the District of Columbia (Article I, Section 8, Clause 17) includes the power to tax without representation. 10

Page

7. In this era of citizens' concern for fundamental rights – as echoed by the President of the United States, national organizations – such as The League of Women Voters, and local District of Columbia organizations over the issue involved herein – this Court should review the vitality of *Heald*, supra, which has been relied on to deprive Petitioner of her fundamental and Constitutional right to be represented in the tax imposing body. 12

APPENDIX

Judgment of the Court of Appeals for the District of Columbia Circuit A-1

Opinion of the Court of Appeals for the District of Columbia Circuit A-2

Opinion, Judgment, and Order of the District of Columbia Tax Court A-7

Editorial Washington Post, July 24, 1970 . . . . . A-16

TABLE OF CASES

Griswold v. Connecticut,
381 U.S. 479 8

Heald v. District of Columbia,
259 U.S. 114 . . . . . 6, 7, 8, 12

Loughborough v. Blake,
18 U.S. (5 Wheat.) 317 . . . . . 6, 7

Wesberry v. Saunders,
376 U.S. 1 8

Page

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution, Article I, Section 1
(U.S.C.A., Const., Article I, Sec. 1) 2, 8

Constitution, Article I, Section 7, Clause 1
(U.S.C.A., Const., Art. I, Sec. 7) 3, 8

Constitution, Article I, Section 8, Clause 1
(U.S.C.A., Const., Art. I, Sec. 8) 3, 7

Constitution, Article I, Section 8, Clause 17
(U.S.C.A., Const., Art. I, Sec. 8) 2, 3, 7, 10

Constitution, 5th Amendment, Due Process Clause
(U.S.C.A., Const. Amend. 5) 2, 3, 8, 9

Constitution, 9th Amendment
(U.S.C.A., Const., Amend. 9) 2, 3, 8

Constitution, 14th Amendment, Section 2
(U.S.C.A., Const., Amend. 14) 4, 7

District of Columbia Income Tax,
47 D.C. Code §1551 *et seq.* 4

MISCELLANEOUS

American Declaration of Independence 10

English Constitutional Documents
Magna Carta of 1215 9
Petition of Rights (1628) 9
The Bill of Rights (1689) 9

Resolution of Delegates from Nine
American Colonies 9, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. _____

SUSAN E. O. BREAKEFIELD,
Petitioner,

v.

THE DISTRICT OF COLUMBIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the District of Columbia Circuit

Susan E. O. Breakefield, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on August 7, 1970.

OPINIONS BELOW

The opinion of the District of Columbia Tax Court is reported at 97 W.L.R. 1421 and is printed, infra, in the Appendix at pp. A-7 to A-15. The opinion of the Court of Appeals is not yet reported but is printed, *infra*, in the Appendix at pp. A-2 to A-6.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on August 7, 1970, and is reproduced, *infra*, in the Appendix at p. A-1. The jurisdiction of this Court is invoked under 28 U.S.C., Sections 1254(1) and 2101(c).

QUESTIONS PRESENTED FOR REVIEW

Whether the District of Columbia Income Tax statute which imposes personal income taxes on Petitioner while depriving her of representation in the tax imposing body is invalid under the United States Constitution. Whether Congress has been granted the power under the Constitution to enact a law under the authority of Article I, Section 8, Clause 17, which is violative of the Due Process Clause of the Fifth Amendment and the Fifth taken with the Ninth Amendment.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Constitution, Article I, Section 1:

> "All legislative Powers herein granted shall be vested in a Congress. . ." U.S.C.A., Const., Art. I, Sec. 1.

Constitution, Article I, Section 7, Clause 1:

> "All bills for raising revenue shall originate in the house of representative;. . ." U.S.C.A., Const., Art. I, Sec. 7.

Constitution, Article I, Section 8, Clause 1:

> "The Congress shall have the power . . .To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; *but all duties, imposts and excises shall be uniform throughout the United States*;" [Emphasis added] U.S.C.A. Const., Art. I, Sec. 8.

Constitution, Article I, Section 8, Clause 17:

> "The Congress shall have the power . . .To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States,. . ." U.S.C.A. Const., Art. I, Sec. 8.

Constitution, 5th Amendment:

> "No person shall . . .be deprived of life, liberty, or property, without due process of law;" U.S.C.A. Const., Amend. 5.

Constitution, 9th Amendment:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S.C.A. Const., Amend. 9.

Constitution, 14th Amendment, Section 2

> "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, *excluding Indians not taxed*. . ." [Emphasis added] U.S.C.A. Const., Amend. 14.

The District of Columbia Income Tax, 61 Stat. 331 (1947), as amended, 47 D.C. Code 1551 et seq. (1967). The Act is too long to be copied in full even by way of the Appendix. The provision imposing the tax, 47 D.C. Code 1567(b) states in part:

> (a) There is hereby annually levied and imposed for each taxable year upon the *taxable income* of every resident a tax at the following rates: . . . [Emphasis added].

STATEMENT

Petitioner's complaint in the lower court sought return of personal income taxes paid to the District of Columbia Government for calendar year 1967, on the basis that 47 D.C. Code 1551 et seq. (1967) was unconstitutional as taking her property without due process of law: to wit, failure to afford her representation in the tax imposing body. The D.C. Tax Court, affirmed by the U.S. Court of Appeals for the District of Columbia, rendered judgment against Plaintiff–Petitioner and for Defendant–Respondent.

JURISDICTION OF THE DISTRICT OF COLUMBIA TAX COURT

The District of Columbia Tax Court had jurisdiction under 47 D.C. Code 1593 (1967), to determine the complaint, whether or not Petitioner was entitled to

recover her taxes paid to the District of Columbia Government in 1967.

FACTS

The trial proceedings below were not recorded. The facts are undisputed. The parties filed (May 16, 1969) an agreed-upon statement of Petitioner-Taxpayer's testimony given at trial, said statement being a part of the Court of Appeal's record.

Taxpayer is an adult citizen of the United States, is sui juris, and from 1964 to the time of filing the suit below resided in Washington, D.C., which was her domicile.

For calendar year 1967, Taxpayer was assessed and paid an income tax of one hundred sixty-two dollars and fifteen cents ($162.15). Taxpayer filed a "Claim for Refund of Income Tax" with the District of Columbia Government on November 22, 1968, which was subsequently denied.

Since 1964, Taxpayer has been of voting age but has not been authorized to vote for any elected representative, except for the United States President and Vice President, and the D.C. School Board beginning in 1968.

During the time which Taxpayer had resided in and had been domiciled in the District of Columbia, she had not ever been permitted to elect representatives in the body which imposed income taxes upon her.

REASONS FOR GRANTING THE WRIT

FIRST

The U.S. Court of Appeals for the District of Columbia (as did the lower Court) strongly urged this

Court to review its past rulings in *Loughborough v. Blake*, 18 U.S. (5 Wheat) 317 (1820) and *Heald v. District of Columbia*, 259 U.S. 114 (1922) in view of contentions presented by Petitioner both as to the original soundness of such rulings and to their continuing vitality in light of later and more recent Supreme Court pronouncements. Being a lower Court, however, the Court of Appeals did not feel competent to find error or erosion of such rulings.

Moreover, although the District of Columbia Tax Court held that it was bound by *Loughborough* and *Heald*, the Court attempted in vain to find a valid rationale for the rule that taxation without representation was no constitutional bar to a local income tax on residents of the District of Columbia. In so analyzing the issue, the Tax Court was clearly asking an appellate Court to review and reverse a rule not based on reason.

SECOND

This case does not merely raise a question as to the fundamental rights of one individual, but raises a question as to the violation of the fundamental rights of over 850,000 residents of the District.

THIRD

Petitioner, and other citizens of the District of Columbia are being taxed without representation in violation of "that great principle which was asserted in our revolution, that representation is inseparable from taxation." *Loughborough v. Blake*, 18 U.S. (5 Wheat) at 324.

FOURTH

Heald v. District of Columbia (supra) is the only holding of this Court sustaining the Constitutionality of

a *local* (as opposed to a national) tax from an attack on the ground of "No Taxation Without Representation." *Heald* is clearly inconsistent with the rationale of *Loughborough v. Blake* (supra).

Loughborough involved a *national* tax imposed on all residents of the United States. In upholding the tax as applied to residents of the District of Columbia under Article 1, Section 8, Clause 17 of the U.S. Constitution, the court found that "that great principle which was asserted in our revolution, that representation is inseparable from taxation," 18 U.S. (5 Wheat.) at 324, was not violated. The citizens of the District were adequately protected by being virtually represented by citizens of the several states since (1) direct taxes had to be apportioned among the several states (Section 2, 14th Amendment), while indirect taxes had to be uniform throughout the United States (Article 1, Section 8, Clause 1), and (2) the tax was imposed on the represented citizens of the several states who had "common interests" and "common feelings" with citizens of the District.

Heald not only fails to cite *Loughborough* or any other case involving the question of taxation without representation but also fails to give any reason for upholding the constitutionality of a *local* as opposed to a *national* tax.

Citizens of the District are not protected by being virtually represented by the citizens of the several states with respect to a *local* tax as required by *Loughborough*. The citizens of the several states have no common interests and common feelings with District citizens since no taxes are imposed upon them but only upon the unprotected and vote-less citizens of the District. In fact, the citizens of the several states have a self-interest in oppressively taxing District citizens since the revenues raised lessen their own tax burden.

FIFTH

Heald v. District of Columbia **(supra) is inconsistent with the criterion of constitutionality developed by this Court since its rendition and with this Court's standards under the Due Process Clause of the Fifth Amendment and the Ninth Amendment.**

A law violates due process (1) if the Constitution contains a principle which that law would violate, and (2) if the law violates rights which are fundamental to liberty and justice. E.g. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

1. Principles Contained In The Constitution Prohibit Taxation Without Representation

Section 2 of the 14th Amendment provides that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, *excluding Indians not taxed*." This provision—that individuals (i.e., Indians) who are not taxed are not to be counted in determining the weight of each taxed citizen's vote clearly shows that the Constitution recognizes the principle that taxation and representation are inseparable. See *Wesberry v. Saunders*, 376 U.S. 1 (1964).

Article I, Section 7 requiring that "All Bills for raising Revenue shall originate in the House of Representatives,. . .". Article I, Section 2 further requiring that the members of the House of Representatives be chosen every two years, and Article I, Section 1, placing the power of taxation in the legislative body (Congress) rather than the executive further demonstrate the principle that taxation and representation are inseparable.

Since the Constitution contains provisions recognizing the principle that an individual cannot be taxed

without a representative in the tax imposing body, the District of Columbia Income Tax violates the Due Process clause of the 5th Amendment to the Constitution.

2. The Right Not To Be Taxed Without Actual or Virtual Representation is a Right Fundamental to Liberty and Justice.

The right not to be taxed without representation can be traced to the Magna Chartz of 1215. Each of the basic constitutional documents of England prior to the adoption of the United States Constitution contain this principle; Sections 12, 30, and 31 of the Magna Charta of 1215; Section X of the Petition of Rights (1628); and The Bill of Rights (1689).

Further, the English Colonist, soon to be an American citizen, regarded the right not to be taxed without his consent either given personally or through a representative as a fundamental right. When the British Parliament passed the Stamp Act of 1765, the colonies met and for the first time in history acted in union to pass the following resolve:

> III. That it is inseparately essential to the freedom of a people and the undoubted right of Englishmen that no taxes be imposed on them but with their own consent, given personally or by their representatives.
>
> V. That the only representatives of the people of these colonies, are persons chosen therein by themselves and that no taxes even have been, or can be Constitutionally imposed on them, but by their respective legislatures. [Emphasis added].

> "Resolution of delegates from nine American colonies, New York, 1765". See E.S. and H.M. Morgan, The Stamp Act Crisis (Chapel Hill, N.C., 1953), pp. 106-7.

When the colonists declared their independence, they listed the reasons why it became necessary to separate from England. Among the reasons was the grievance:

> "For imposing Taxes on us without our consent." Declaration of Independence, 1776.

Since the right not to be taxed without representation is a right fundamental to liberty and justice, the District of Columbia Income Tax violates this principle and should be held unconstitutional.

SIXTH

No provision of the Constitution states that Congress can tax District citizens without a representative. The only provision from which such a power might be implied is Article I, Section 8, Clause 17 in which Congress is given the power "To exercise exclusive Legislation in all Cases whatsoever, over such District. . .".

It is Petitioner's contention that such power to tax without representation was not within the contemplation of the Drafters of the Constitution. There are numerous arguments against implying such a power.

The power to legislate normally means the power to regulate rather than the power to take property. This argument was raised over and over when the colonists were protesting the Stamp Act. See, Daniel Dulany, "Considerations on the Propriety of Imposing Taxes in the British Colonies for the Purpose of Raising a Revenue by Act of Parliament" (London 1766). This

argument was used by William Pitt in a speech on January 14, 1766 in Parliament which caused the repeal of the Stamp Act, see W. S. Taylor and J. H. Pringle, eds., Correspondence of William Pitt, Earl of Chatham (London, 1888). See also, John Dickinson, "Letters II and IV From Letters From a Farmer", found in P.L. Ford, ed., "The Writings of John Dickinson" (Philadelphia, 1895) which also argues that the power to legislate does not include the power to tax to raise revenue when the party taxed has no representation.

Secondly, it is inconceivable that the Drafters would grant such a broad power unless the people taxed had some kind of protection against arbitrary taxation. This is supported by the fact that in providing for national taxation a vast amount of protection was granted: the tax must be uniform throughout the country, the tax must originate in the House where the people are represented, and the tax imposing body can be recalled every two years if they abuse their representative powers. Since the Drafters were concerned about the possibility of abusive taxation, they must have intended that the power of exclusive legislation not include the power to tax without representation, or some protection would have been provided.

As the Second Continental Congress stated in its Declaration of the Causes and Necessity of Taking Up Arms on July 6, 1775:

> But why should we enumerate our injuries in detail? By one statute it is declared, that Parliament can "of right make laws to bind us IN ALL CASES WHATSOEVER." What is to defend us against so enormous, so unlimited a power? Not a single man of those who assume it, is chosen by us; or is subject to our control or influence; but on the contrary, they are all

> of them exempt from the operation of such laws, and an American Revenue, if not diverted from the ostensible purpose for which it is raised, would actually lighten their own burdens in proportion as they increase ours. W.C. Ford, ed., *Journals of the Continental Congress*, Vol. II, pp. 140 ff.

Since no express provision of the Constitution grants Congress the power to levy a local tax on District citizens unless they are represented, no such power should be implied from the power to legislate exclusively for the District since such an implication was not intended by the Drafters of the Constitution.

SEVENTH

In this era of concern of citizens for fundamental rights, as echoed by the President of the United States, national organizations, and local District of Columbia organizations over the issue involved herein, this Court should review the vitality of *Heald* which has been relied on to deprive Petitioner of her fundamental and Constitutional right to be represented in the tax imposing body.

As the President of the United States stated in a speech on January 31, 1969:

> The District is a Federal city, but it should not be a Federal colony. Nearly 200 years ago, the people of America confronted the question of taxation without representation. It was not acceptable then; it hardly is justifiable today.[1]

[1] Quoted in letter dated May 13, 1969 from the Attorney General of the United States, to the Speaker of the House of Representatives.

WHEREFORE, Petitioner prays that a writ of certiorari issue to review the judgment of the Court below.

NICHOLAS A ADDAMS
1707 N Street, N.W.
Washington, D.C. 20036

JOHN F. COLDREN, III
Suite 600
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorneys for Petitioner

APPENDIX

[Filed August 7, 1970]

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 23,456

SUSAN E. O. BREAKEFIELD,
Petitioner,

v.

DISTRICT OF COLUMBIA
Respondent.

Petition for Review of a Decision of the District of Columbia Tax Court

Before: McGowen, Robinson and MacKinnon, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the District of Columbia Tax Court, and was argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED by this Court that the decision of the District of Columbia Tax Court on review herein be, and it is hereby, affirmed.

Per Curiam

For the Court:
Nathan J. Paulson
Clerk

Dated: August 7, 1970.
Opinion per curiam.

[U.S. Court of Appeals for the District of Columbia]

OPINION
Decided August 7, 1970

Mr. Nicholas A. Addams, with whom *Mr. John I. Coldren, III*, was on the brief, for petitioner.

Mr. Henry E. Wixon, Assistant Corporation Counsel for the District of Columbia, with whom *Messrs. Charles T. Duncan*, Corporation Counsel at the time the brief was filed, and *Hubert B. Pair*, Acting Corporation Counsel, were on the brief, for respondent.

Before McGowan, Robinson and MacKinnon, *Circuit Judges.*

Per Curiam: Tendered for our resolution is the question whether the Congress, in legislating for the District of Columbia,[1] was constitutionally empowered to enact the provisions of the District of Columbia Income and Franchise Tax Act of 1947[2] which impose an income tax on individuals residing in the District notwithstanding that they then had and now have no elected representative in the Congress.[3] Our petitioner is a citizen of the United States who is and since 1964 has been an adult domiciliary resident of the District, as such without right to vote for a representative in either House of the Federal Legislature. Asserting that taxation by and representation in the tax-imposing body are constitutionally inseparable, petitioner sought a refund of the Dis-

---

[1] "The Congress shall have Power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District . . ." U.S. Const., art. I, § 8, cl. 17.

[2] 61 Stat. 331 (1947), as amended, D.C. Code §§ 47-1551 *et seq.* (1967).

[3] See note 10, *infra.*

trict income tax she paid for the calendar year 1967. The District of Columbia Tax Court sustained the tax and, on review here, so do we.

Petitioner's position embodies a sizeable array of arguments drawn from both constitutional and historical sources.[4] The Tax Court, however, felt "obligated to decide this case for respondent on the basis of [Supreme Court] authorities[5] which petitioner claims are 'clearly erroneous' and 'should be overruled'." We share the Tax Court's sensitivity to an abiding obligation to following

---

[4] As summarized by the Tax Court,

> Petitioner's main argument rests on an inference from Section 2 of the 14th Amendment providing that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." Petitioner says that this provision "that individuals [i.e. Indians] who are not taxed are not to be counted in determining the weight of each taxed citizen's vote clearly shows that the Constitution recognized the principle that taxation and representation are inseparable," citing the "one-man one-vote" decision, *Wesberry v. Sanders*, 376 U.S. 1 (1964).
>
> Petitioner recognizes the exclusive power of Congress to legislate for the District, but "maintains that such power must be carefully exercised in a constitutional manner" and in relation to the other provisions of the Constitution preserving the rights of persons and of citizens. Finally, petitioner urges that it is a "fundamental right" to have representation within the taxing authority; that this right is preserved by the Ninth Amendment provision "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," and that pre-constitutional precedents in England and the American colonies, from the Magna Charta to the Declaration of Independence, back up her position. (footnotes omitted)

[5] Notably those cited *infra* notes 6, 8.

binding precedent, and affirm the judgment under review without undertaking the redefinition of the law petitioner requests.

As far back as 1820, the Supreme Court, through Chief Justice Marshall, declared unanimously that those choosing residence in the District of Columbia have "voluntarily relinquished the right of representation, and. . .adopted the whole body of Congress for. . .[their] legitimate government. . . ."[6] Throughout the many years since, the Court, notwithstanding this lack of representation, has consistently upheld the "full and unlimited jurisdiction [of Congress], both of a political and municipal nature, over the District of Columbia."[7] In 1922, the Court, again unanimously, upheld an act of Congress[8] laying a tax on intangible personal property of persons residing or doing business in the District against the contention, *inter alia*, "that the act is void, because it subjects the residents of the District to taxation without representation."[9] Expressing its opinion through Mr. Justice Brandeis, the Court said:

> It is sufficient to say that the objection is not sound. There is no constitutional provision which so limits the power of Congress that taxes can be imposed only upon those who

---

[6] *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 324 (1820).

[7] *Shoemaker v. United States*, 147 U.S. 282, 300 (1893). See also *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 619 (1838); *Binns v. United States*, 194 U.S. 486, 491-92 (1904); *Berman v. Parker*, 348 U.S. 26, 31-32 (1954). And see *District of Columbia v. Thompson Co.*, 346 U.S. 100, 109 (1953), and text *infra* at note 10.

[8] *Heald v. District of Columbia*, 259 U.S. 114 (1922).

[9] *Id.* at 124.

> have political representation. And the cases are many in which laws levying taxes for the support of the government of the District have been enforced during the period in which its residents have been without the right of suffrage.[10]

And only last year we ourselves found "insubstantial" the claim that the District's Mayor-Commissioner and the members of the City Council were illegally appointed "because the citizens of the District have not been given the opportunity by popular vote to elect persons to the positions held by" them.[11]

Petitioner's countervailing thesis questions both the original soundness of the foregoing Supreme Court determinations and their continuing vitality in the light of

---

[10] *Id.* (footnote omitted). That the Court's view on the constitutional aspects extended to taxation of income as well as of intangibles is plain from the following passage from the opinion:

> Residents of the District lack the suffrage and have politically no voice in the expenditure of the money raised by taxation. Money so raised is paid into the Treasury of the United States, where it is held, not as a separate fund for the District, but subject to the disposal of Congress, like other revenue raised by Federal taxation. The objection that the tax is void because of these facts, is fundamental and comprehensive. It is not limited in application to the tax on intangibles, but goes to the validity of all taxation of residents of the District. If sound, it would seem to apply not only to taxes levied upon residents of the District for the support of the government of the District; but also to those taxes which are levied upon them for the support generally of the government of the United States.

[11] *Carliner v. Commissioner of District of Columbia*, 134 U.S.App.D.C. 43, 44, 412 F.2d 1090, 1091, *cert. denied*, 386 U.S. 987 (1969). See also *Hobson v. Tobriner*, 255 F.Supp. 295, 298-99 (D.D.C. 1966), *petition for review for mandamus denied sub nom., Hobson v. Gasch*, No. 20,838 (D.C. Cir. Sept. 29, 1966), *cert. denied*, 386 U.S. 914 (1967).

later Supreme Court pronouncements. We think, however, that appellant presents those contentions in the wrong forum. Save only for the exceptional cases where the proper decisional result is very clear,[12] it is for the Supreme Court, not us, to proclaim error in its past rulings, or their erosion by its adjudications since.

Affirmed.

---

[12] *E.g., Fleming v South Carolina Elec. & Gas Co.*, 224 F.2d 752, 753 (4th Cir. 1955), *aff'd*, 351 U.S. 901 (1956); *Barnette v. West Virginia State Bd. of Educ.*, 47 F.Supp. 251, 252-53 (S.D.W. Va. 1942), *aff'd*, 319 U.S. 624 (1943).

[Filed July 11, 1969]

OPINION NO. 1079

DISTRICT OF COLUMBIA TAX COURT

SUSAN E. O. BREAKEFIELD, *Petitioner*	)	
v.	)	DOCKET NO. 2074
DISTRICT OF COLUMBIA, *Respondent.*	)	

OPINION AND DECISION

This is a test case on the issue, whether Congress can subject District of Columbia residents to income taxes while denying them the right to vote. The facts are simple: petitioner from 1964 to date has been qualified to vote and has resided in the District; seeks refund of the amount she paid in D.C. income taxes for the calendar year 1967; has never been allowed to vote except for the "President and Vice President and the D.C. School Board beginning in 1968"—see agreed-on testimony—and has complied with the procedural requirements for bringing this lawsuit.

The issue is solely one of law, based on facts of common knowledge and therefore subject to judicial notice. As everyone knows, Washington is a—

> "colonial enclave technically named the District of Columbia and known to the locals as "the District." * * * The people of the District—

there are 800,000 of them—differ from all other Americans in a most curious way. By living in the capital of the world's most powerful democracy, they forfeit the basic democratic right—the right of self-government.

They have no voice in the levying of taxes, although they pay them. * * * They have no representation in Congress, and no vote in the councils that rule them."[1]

Under P.L. 376 Ch. 862 of the 84th Congress, approved August 12, 1955, the officials of D.C. political parties have been chosen by D.C. voter-members of such parties beginning in 1956. In November, 1964, as a result of the 23d Amendment, D.C. citizens for the first time were allowed to vote for the number of electors of the President and Vice-President of the United States "to which the District would be entitled if it were a State, but in no event more than the least populous State." (There are eleven States with less population than the District.) Beginning in November, 1968, they have also been allowed to vote for members of the D.C. Board of Education. These limited voting rights do not answer the question as posed in this case: whether Congress, where petitioner is not represented, can constitutionally levy taxes on her in the face of the "principle that taxation and representation are inseparable." (Pet. Br. 10.)

The contentions as developed by the parties hereto. Petitioner's main argument rests on an inference from

---

[1] Russel Baker, in Holiday magazine, February, 1967, p. 65; see also, for similar overviews, "A Tale of Two Cities: Washington and its Finances," League of Women Voters of D.C., published June, 1962; "Washington—The Lost Colony," the New Republic magazine, Andrew Kopkind & James Ridgeway, April 23 and April 30, 1966.

Section 2 of the 14th Amendment,[2] providing that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." Petitioner says that this provision "that individuals [i.e. Indians] who are not taxed are not to be counted in determining the weight of each taxed citizen's vote clearly shows that the Constitution recognizes the principle that taxation and representation are inseparable," citing the "one-man one-vote" decision, *Wesberry v. Sanders*, 376 U.S. 1 (1964).

Petitioner recognizes the exclusive power of Congress to legislate for the District,[3] but "maintains that such power must be carefully exercised in a constitutional manner" (Br. 6-7) and in relation to the other provisions of the Constitution preserving the rights of persons and of citizens. Finally, petitioner urges that it is a "fundamental right" (Br. 10) to have representation within the taxing authority; that this right is preserved by the Ninth Amendment provision "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," and that pre-constitutional precedents in England and the American colonies, from the Magna Charta to the Declaration of Independence, back up her position.

---

[2]Effective July 28, 1868, the quoted portion superseded a provision of Article I of the Constitution as originally written: "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."

[3]Article I, Section 8, clause 17: "The Congress shall have Power * * * to exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States * * *."

Respondent's argument is based solely on the Article I, Section 8 clause 17 of the Constitution, *supra*, note 2: "* * * with respect to the District, Congress possesses the combined powers of both a general and a local government * * * such powers are plenary and unqualified." (Br. 2.) The constitutional power of Congress in this regard, under the controlling court decisions, "is as great as the power of a state legislature with respect to the state or any of its subdivisions." (*id.*) Respondent does not ask that the suit be dismissed on the syllogism (1) Congress has exclusive authority over the District, its representation and its taxes, (2) the issues are therefore political, to be addressed to Congress and not to the courts, (3) this court therefore has no jurisdiction. Such a syllogism might run into *Wesberry v. Saunders, supra*, 376 U.S. at 7, "the right to vote [substitute, "representation in the taxing authority"] is too important in our free society to be stripped of judicial protection by such an interpretation of Article I." Nor does respondent discuss the merits of petitioner's thesis, but contends that because of the "many decisions reciting the authority of the Congress to enact taxing legislation for the District of Columbia," the assessment of taxes against petitioner "is not subject to attack on any constitutional ground." (Br. 4.)

Conclusion and discussion. As stated at the oral argument, this Court is obliged to decide this case for respondent on the basis of the authorities which petitioner claim are "clearly erroneous" and "should be overruled." (Br. 14, 15.) *Loughborough v. Blake*, 5 Wheat. 317, 5 L.Ed. 98 (1820); *Heald v. District of Columbia*, 259 U.S. 114 (1922). Petitioner's attorneys, on argument, recognized that the issue is one for the higher courts, on appeal from this decision. But a short discussion of the cases and petitioner's theory is in order, to serve as a point of departure for such appeal.

In *Loughborough*, Chief Justice Marshall considered the constitutional provision, *supra* note 3, giving Congress the power, as he phrased it, of "exclusive legislation in all cases whatsoever within this district," in the light of the contention there made (5 Wheat. at 324)–

> That they [these terms] must be limited by that great principle which was asserted in our revolution–that representation is inseparable from taxation.

According to Chief Justice Marshall this principle applies to the situation in which "a continent, with an immense population" is taxed "by a government having no common interest with it, separated from it by a vast ocean, * * * associated with it by no common feelings * * *." It does not apply to the American Territories "in a state of infancy advancing to manhood, looking forward to complete equality so soon as that state of manhood shall be attained." Nor does the principle apply to the District of Columbia, "which has voluntarily relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government * * *." (5 Wheat. at 324). In extending his consideration of the District's situation, Chief Justice Marshall said (5 Wheat. at 324-325)–

> Although in theory it might be more congenial to the spirit of our institutions to admit a representative from the district, it may be doubted whether, in fact, its interests would be rendered thereby the more secure; and certainly the Constitution does not consider their want of a representative in Congress as exempting it from equal taxation.

Whence the third headnote to this famous opinion, presumably by Counsellor at Law Wheaton: "The power of Congress to exercise exclusive jurisdiction of all cases

whatsoever within the District of Columbia, includes the power of taxing it."

The idea that the people of the District of Columbia have "voluntarily relinquished" their right to representation in Congress has recurred in several decisions, most recently in *Hobson v. Tobriner*, 255 F.Supp. 295, 300, pet. for mandamus denied Sept. 29, 1966, CADC, *cert.* denied 386 U.S. 914 (1967)–

> By choosing to live within the District of Columbia, all citizens, regardless of race, relinquish the right to vote in local elections. * * * their influence on the form of government which exercises jurisdiction over them is limited to the right to vote for the President.

In the context of 1969, rather than 1820, the question occurs: how many citizens have chosen to live in D.C. rather than in, *e.g.*, the Sumner, Kenwood or Belle Haven suburbs, and have "adopted the whole body of Congress," rather than their own representatives, as their legitimate government? Such a question realistically pertains to a consideration of the merits of petitioner's thesis.

In the *Heald* case, it was "earnestly contended that the act [levying an intangible property tax] is void, because it subjects the residents of the District to taxation without representation."[4]

Mr. Justice Brandeis dealt with the contention summarily (259 U.S. at 124)–

> There is no constitutional provision which so limits the power of Congress that taxes can be imposed only upon those who have political

---

[4]Note that Mr. Vernon E. West, later the long-time Corporation Counsel of the District of Columbia, appeared for plaintiff in error making this contention.

> representation. And the cases are many in which laws levying taxes for the support of the government of the District have been enforced during the period in which its residents have been without the right of suffrage.

In a footnote, Justice Brandeis cites several cases, none of which take up or discuss the rule, or the reason for the rule.

Nonetheless, the rule is clear and definitely applicable to the case at bar: Congress, where they are not represented, may tax citizens of the District. The "seat of the Nation's government" aspect of the whole situation of the District has often been used to justify its unfavored status vis-a-vis the States. See the language in *O'Donaghue v. U.S.*, 289 U.S. 516, at 538-539, and *Grether v. Wright*, 75 Fed. 742, 757 (opinion by Judge, later Chief Justice Taft). But of course the District, in 1969, is partly what the tourists see—"the seat of the Nation's government"—and mostly the surrounding metropolis.

Again, the reason for the rule may be avoided by calling the issue political, rather than judicial, thus for Congress, not for the courts. See *Hobson, supra*, 255 F.Supp. at 299-300, citing *Ohio v. Akron Park District*, 281 U.S. 74, 78. However, the Supreme Court has not used this approach in recent cases. *e.g. Powell v. McCormack*, decided June 16, 1969, and *Walz v. Tax Commission of the City of New York*, probable jurisdiction noted in Supreme Court Docket No. 1415, June 16, 1969. There are limits to the plenary power of Congress over the District citizens, although they include "only the rights of citizens which flow from the Constitution to all citizens." 255 F.Supp. at 299.

It may well be that the "great principle which was asserted in our revolution," *supra*, simply does not inhere in the implications of our Constitution. It may be that

we are really dealing with a slogan—which has been a rallying cry for the use of force in all the precedents cited by petitioner back to and including the Magna Charta—rather than with fundamental rights of citizens of the District. Another case might be presented if District citizens were taxed at burdensome rates much higher than the rates paid by citizens of, say, Virginia and Maryland. No such claim is made here.

The real purpose of this petition is to obtain some sort of leverage over Congress, by which suffrage for the District can be pried out. The direct effort has failed. *Carliner v. Board of Com'rs*, 265 F.Supp. 736 (DCDC), affirmed, CADC No. 21,786, June 24, 1969. On the authorities, the present effort must also fail.

Decision will be entered for respondent.

Robert M. Weston
Judge

DISTRICT OF COLUMBIA TAX COURT

DECISION

This case having come on for hearing on the pleadings, stipulation of facts, argument and briefs of petitioner and respondent, is hereby

ADJUDGED AND DETERMINED, That on the authorities judgment is hereby rendered for the District of Columbia, respondent.

Robert M. Weston
Judge

Opinion and Decision
Served as follows:

Nicholas A. Addams, Esq.
933 Washington Building
Washington, D.C. 20005

John I. Coldren, III, Esq.,
2349 Ashmead Street, N.W.
Washington, D.C. 20009

Attorneys for Petitioner (Mailed 7/11/69)

Finance Officer, D.C. (Mailed 7/11/69)

Corporation Counsel, D.C. (Mailed 7/11/69)

Phyllis R. Liberti, Clerk

The Washington Post

AN INDEPENDENT NEWSPAPER FRIDAY, JULY 24, 1970

"First We Try It Out On The Slaves"

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
DEC 7 1970
E. ROBERT SEAVER, CLERK

BRIEF FOR RESPONDENT IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 940

SUSAN E. O. BREAKEFIELD, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

C. FRANCIS MURPHY,
Acting Corporation Counsel, D.C.

HENRY E. WIXON,
Assistant Corporation Counsel, D.C.

RICHARD G. AMATO,
Assistant Corporation Counsel, D.C.

Attorneys for Respondent
District Building,
Washington, D.C. 20004

INDEX

SUBJECT INDEX

PAGE

Jurisdiction 1

Question Presented 1

Reasons Why The Writ Should Be Denied:

No case is presented calling for the exercise of this court's jurisdiction to review on writ of certiorari 2

Conclusion 6

CASES CITED

Atlantic Cleaners & Dyers v. *United States*, 286 U.S. 427 (1932) 3

Berman v. *Parker*, 348 U.S. 26 (1954) 3

Capital Traction Co. v. *Hof*, 174 U.S. 1, 5 (1899) 3

Carliner v. *Commissioner of the District of Columbia*, No. 631, December 15, 1969 2

Gibbons v. *District of Columbia*, 116 U.S. 404, 407-408 (1886) 3

Heald v. *District of Columbia*, 259 U.S. 114, 124 (1922) 4

Hobson v. *Tobriner*, 255 F. Supp. 295 (D.D.C. 1966) 2

Hobson v. *Gasch*, No. 20,838, September 29, 1966 2

Kendall v. *United States*, 37 U.S. (12 Peters) 524, 619 (1838) 4

Loughborough v. *Blake*, 18 U.S. (5 Wheat.) 317, 324 (1820) 4

Mattingly v. *District of Columbia*, 97 U.S. 687, 690 (1878) 4

National Insurance Company v. *Tidewater Co.*, 337, U.S. 582, 601-602 5

Neild v. *District of Columbia*, 71 U.S.App. D.C. 306, 310 110 F.2d 246, 250 6

O'Donoghue v. *United States*, 289 U.S. 516 (1933) 3

Shoemaker v. *United States*, 147 U.S. 282, 300 (1893) 4

UNITED STATES CONSTITUTION CITED

Article I, Section 8, Clause 17 3

STATUTES CITED

United States Code, Vol. 28, Sections 1254(1) and 2102(c) 1

District of Columbia Code,
Section 47-2404(a), 66 Stat. 544, ch. 649, section 3(b) 1

District of Columbia Income and Franchise Tax Act of 1967,
as amended 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 940

SUSAN E. O. BREAKEFIELD, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

JURISDICTION

This Court has jurisdiction under 66 Stat. 544, ch. 649, section 3(b), D.C. Code, Sec. 47-2404(a), rather than under 28 U.S.C., sections 1254(1) and 2102(c) as relied upon by petitioner.

QUESTION PRESENTED

In the view of respondent, the question presented is: Where the Constitution of the United States confers upon the Congress plenary power to legislate for the District of Columbia, were not the courts below clearly correct in concluding that, notwithstanding the fact that the District of Columbia does not have an elected representative in either House of Congress, petitioner was properly taxed

for the calendar year 1967 under the congressionally enacted District of Columbia Income and Franchise Tax Act of 1947, as amended.

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner, a resident of the District of Columbia, contends that this Court should, once again, consider the question whether the District of Columbia Income and Franchise Tax Act of 1947, as amended, which imposes personal income taxes on District residents, is unconstitutional since the Congress does not have an elected representative from the District of Columbia. This Court recently denied certiorari in a similar case. *Carliner* v. *Commissioner of the District of Columbia*, No. 631, December 15, 1969. In the *Carliner* case the issue presented was whether petitioners' claim that the Constitution confers on District of Columbia residents a right of self-government through elective officials presented an issue of sufficent substantiality to require the convening of a three-judge District Court. In concluding that petitioners' constitutional claim was wholly insubstantial, the United States Court of Appeals for the District of Columbia Circuit relied, *inter alia*, on the recent case of *Hobson* v. *Tobriner*, 255 F.Supp. 295 (D.D.C. 1966),[1] which involved the identical issue presented in *Carliner*.

In denying the application for a three-judge District Court in the Hobson case, Judge Gasch of the United States District Court for the District of Columbia stated:

> "The fact that plaintiffs' claim of unconstitutionality based upon 'taxation without representation' has been positively decided by the Supreme Court

[1] Petition for a writ of mandamus denied by the United States Court of Appeals for the District of Columbia Circuit, *sub nom. Hobson v. Gasch*, No. 20,838, September 29, 1966. Petition for writ of certiorari denied, 386 U.S. 914 (1967).

is an important factor in determining whether a three-judge court should be convened.

> "* * * It is clear that the absence of suffrage is not a bar to the power of Congress to tax the citizens of the District of Columbia, be it for local or national purposes. That portion of plaintiffs' complaint which challenges this power is deemed by the Court to be insubstantial and does not afford a basis for the convening of a three-judge court." [footnote omitted.]

The contention that the Constitution gives the taxpayers of the District of Columbia the right to an elective representative in Congress necessarily involves the contention that Congress has historically engaged in an unconstitutional usurpation of power whenever it enacted local measures in the exercise of its exclusive legislative authority over the District of Columbia. However, Article I, Section 8, Clause 17 of the Constitution, which authorizes Congress to "exercise exclusive Legislation in all Cases whatsoever" over the District of Columbia, has been construed by this Court to mean that with respect to the District Congress possesses the combined powers of both a general and a local government and that such powers are plenary and unqualified. *O'Donoghue* v. *United States*, 289 U.S. 516 (1933); *Atlantic Cleaners & Dyers* v. *United States* 286 U.S. 427 (1932). Moreover, this Court has consistently held that the constitutional power of Congress to legislate with respect to the District is as great as the power of a state legislature with respect to the state or any of its subdivisions. *Berman* v. *Parker*, 348 U.S. 26 (1954); *Atlantic Cleaners & Dyers* v. *United States, supra*, 286 U.S. at 434-435; *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 5 (1899); *Gibbons* v. *District of Columbia*, 116 U.S. 404, 407-408

(1886); *Mattingly* v. *District of Columbia,* 97 U.S. 687, 690 (1878).

As early as 1820 this Court through Chief Justice Marshall stated its unanimous opinion that:

> "* * * Although, in theory, it might be more congenial to the spirit of our institutions, to admit a representative from the District, * * * *certainly, the constitution does not consider their want of a representative in congress as exempting it from equal taxation.*" *Loughborough* v. *Blake,* 18 U.S. (5 Wheat.) 317, 324 (1820). [Emphasis supplied.]

In 1838, this Court stated that "Congress has the entire control over the District, for every purpose of government * * *." *Kendall* v. *United States,* 37 U.S. (12 Peters) 524, 619 (1838). Later, in *Shoemaker* v. *United States,* 147 U.S. 282, 300 (1893), this Court noted that Congress has "full and unlimited jurisdiction, both of a political and municipal nature, over the District of Columbia * * *." Thereafter, in *Heald* v. *District of Columbia,* 259 U.S. 114, 124 (1922), this Court, speaking through Mr. Justice Brandeis, rejected the contention that a local taxing statute was void because it subjected District of Columbia residents to taxation without representation, stating that:

> "Finally, it is earnestly contended that the act is void, because it subjects the residents of the District to taxation without representation. Residents of the District lack the suffrage and have politically no voice in the expenditure of the money raised by taxation. Money so raised is paid into the Treasury of the United States, where it is held, not as a separate fund for the District, but subject to the disposal of Congress, like other revenues raised by federal taxation. The objection that the

> tax is void because of these facts, is fundamental and comprehensive. It is not limited in application to the tax on intangibles, but goes to the validity of all taxation of residents of the District. If sound, it would seem to apply not only to taxes levied upon residents of the District for the support of the government of the District; but also to those taxes which are levied upon them for the support generally of the government of the United States. It is sufficient to say that the objection is not sound. There is no constitutional provision which so limits the power of Congress that taxes can be imposed only upon those who have political representation. And the cases are many in which laws levying taxes for the support of the government of the District have been enforced during the period in which its residents have been without the right of suffrage." [footnote omitted.]

As recently as 1949, this Court in *National Insurance Company* v. *Tidewater Co.*, 337 U.S. 582, 601-602, quoted a portion of an opinion of the United States Court of Appeals for the District of Columbia Circuit on the broad authority of the Congress over the District. In the course of the opinion in *National Insurance Company* this Court said:

> "* * * the Court of Appeals for the District itself, sitting *en banc*, * * * said that Congress 'possesses full and unlimited jurisdiction to provide for the general welfare' of District citizens 'by any and every act of legislation which it may deem conducive to that end * * * when it legislates for the District, Congress acts as a legislature of national character, exercising complete legislative control as contrasted with the limited power of a

> state legislature, on the one hand, and as contrasted with the limited sovereignty which Congress exercises within the boundaries of the states, on the other.' *Neild* v. *District of Columbia,* 71 U.S.App. D.C. 306, 310, 110 F.2d 246, 250."

Clearly, the contention that petitioner cannot constitutionally be taxed by the Congress since she, as a resident of the District of Columbia, does not have an elected representative in Congress and that, to this extent, the power of Congress over the seat of government is limited, cannot be reconciled with the explicit constitutional authority of Congress over the District as upheld by an unbroken line of decisions of this Court spanning a period of more than 100 years.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

C. FRANCIS MURPHY,
Acting Corporation Counsel, D.C.

HENRY E. WIXON,
Assistant Corporation Counsel, D.C.

RICHARD G. AMATO,
Assistant Corporation Counsel, D.C.

Attorneys for Respondent
District Building,
Washington, D.C. 20004

December 7, 1970